Lapeer Foundry: The NLRB Closes the Door on Unilateral Economic Layoffs

I. INTRODUCTION

A. *Labor-Management Legislation*

With the passage of the Wagner Act[1] in 1935, the worker was given the right to organize, to bargain collectively, and to engage in strikes, picketing, and other concerted activities.[2] These three rights were aimed at establishing a balance of bargaining power between the employer and the employee.[3] Two subsequent amendments have been made to the Wagner Act in response to the abuse of union power.[4] In 1947, the Taft-Hartley Act[5] was passed to protect the employee's right to refrain from joining a union and to restrict the union's strike and boycott weapons.[6] The union's strike and boycott weapons were further restricted by the Landrum-Griffin Act[7] in 1959.[8] The Wagner Act and its two subsequent amendments provide the legislative framework for any discussion of the desired balance between labor and management and will be referred to collectively as the National Labor Relations Act (NLRA).

B. *Legislation Pertaining to Employer Unilateral Action*

The key part of the NLRA in relation to unilateral action by the employer is section 8(a)(5), which sets forth mandatory subjects of bargaining and requires the employer to bargain in good faith with the employee with respect to wages, hours, and other terms and conditions of employment.[9] Among the mandatory subjects of bargaining in the category of other terms and conditions of employment are layoffs.[10] In the early years of the NLRA when the National Labor Relations Board (Board) was attempting to define section 8(a)(5) of the NLRA, unilateral action by the employer was not considered to be a per se violation of the NLRA.[11] For the past several decades, however, the Board generally has applied a per se test of invalidity to unilateral employer action.[12]

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1. National Labor Relations Act (NLRA), 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (1982)).

2. C. MORRIS, THE DEVELOPING LABOR LAW 28 (1971).

3. *Id.*

4. *See generally*, J. GROSS, THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION 1937-1947 (1981); H. MILLIS & E. BROWN, FROM THE WAGNER ACT TAFT-HARTLEY (1950).

5. Labor Management Relations Act, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-87 (1982)).

6. Modjeska, *Federalism in Labor Relations—The Last Decade*, 50 OHIO ST. L.J. 487, 488 (1989).

7. Labor-Management Reporting and Disclosure Act, 73 Stat. 519 (1959) (codified as amended at 29 U.S.C. §§ 401-531 (1982)).

8. Modjeska, *supra* note 6, at 488.

9. 29 U.S.C. § 158(d) (1982) (Taft-Hartley Act).

10. C. MORRIS, *supra* note 2, at 336 (2d ed. & 3d Supp. 1982-86).

11. Schatzki, *The Employer's Unilateral Act—A Per Se Violation Sometimes*, 44 TEX. L. REV. 470, 471 (1966).

12. *Id.* at 473.

Although called per se, the test could more accurately be termed a rebuttable presumption, as a few limited defenses are available, including: bargaining to impasse, unilateral action in response to unprotected union concerted activities or pursuant to union consent, and occasionally business necessity.[13]

The fourth defense of justifiable business necessity will be the prime focus of this Comment. This Comment will first discuss the major Supreme Court decisions in the field of layoffs and similar unilateral terminations of employment based on economic necessity. The Comment will further discuss the Board's current stance toward economically motivated layoffs that are implemented by unilateral action. A discussion of the future implications of the Board's current stance will follow. The discussion will consider prior case law where the compelling economic circumstance defense was successfully used by the employer to excuse unilateral action. Finally, the Comment will conclude by suggesting that the compelling economic circumstance defense is a valid justification for certain unilateral acts and that the Board should weigh the economic situation of the employer before blindly labeling a unilateral economic layoff as an illegal refusal to bargain.

II. FOUNDATION OF THE ECONOMIC LAYOFF AS A REFUSAL TO BARGAIN

A. Katz *and* Fibreboard

The cornerstone case in the area of unilateral action by the employer is *NLRB v. Katz*.[14] In *Katz*, the employer and the union had been in the process of bargaining over merit increases, general wage increases, and sick leave benefits.[15] Before the parties had completed the bargaining process or reached an impasse, the employer unilaterally granted merit increases, changed the sick leave policy, and instituted a new automatic wage increase system.[16] Although the employer argued that the union had adopted obstructive negotiation tactics[17] and that the Board must find bad faith accompanying the unilateral action to find a section 8(a)(5) violation,[18] the Supreme Court found that the employer had violated the duty to bargain collectively with the union.[19] However, the Court left open the possibility that other unilateral acts may be valid by stating that "we do not foreclose the possibility that there might be circumstances which the Board could or should accept as excusing or justifying unilateral action."[20]

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13. *Id.* For a demonstration of the narrowness of the consent defense see NLRB v. United Nuclear Corp., 381 F.2d 972 (10th Cir. 1967) (holding that an employer had violated the NLRA by implementing a unilateral layoff after rejecting the employer's defense of union consent, even though the union representative had stated that the economic layoff was strictly a management prerogative).

14. 369 U.S. 736 (1962).

15. *Id.* at 739-41.

16. *Id.* at 741.

17. *Id.*

18. *Id.* at 742.

19. *Id.* at 747.

20. *Id.* at 748.

The second important case in the area of unilateral action is *Fibreboard Corp. v. NLRB*.[21] In *Fibreboard*, the union gave timely notice to the employer that it wished to modify the existing contract between the employer and the union.[22] In response, the employer notified the union that the employer would be contracting out the maintenance work performed by union members and, therefore, negotiation of a new contract would be meaningless.[23] The Supreme Court once again signaled the importance of collective bargaining and exhibited its distaste for unilateral action by declaring that this replacement of union employees with an independent contractor was a mandatory subject of bargaining and that the employer had violated the NLRA.[24] In a concurring opinion, Justice Stewart was quick to point out that the majority opinion should not be read to mandate that "every managerial decision which necessarily terminates an individual's employment is subject to the duty to bargain."[25] Stewart warned that the broad language of the majority opinion should not be interpreted so as to force the duty to bargain on the employer in relation to decisions which lie at the core of entrepreneurial control.[26] Stewart noted the sharp departure from the traditional free enterprise system that would occur if the unions were permitted to bargain over decisions located at the core of entrepreneurial control.[27]

B. *Foundation Cases in the 1980s*

Katz and *Fibreboard* laid the framework for the per se test of unlawfulness in regard to unilateral action by the employer. It was not until 1981 that the Supreme Court again expressed its views on unilateral action. In *First National Maintenance Corp. v. NLRB*,[28] the Court took the first step in recognizing that certain managerial decisions may be within Justice Stewart's protected core of entrepreneurial control. In *First National Maintenance*, the employer was under a contract to perform maintenance for a nursing home. Because of a dispute with the nursing home, the contract was unilaterally terminated and the employees who were working at the nursing home were subsequently discharged.[29] Before the nursing home contract was terminated, however, a union was certified as the bargaining representative of the employees working at the nursing home. Upon certification, the union requested but was denied a bargaining session and a delay in the termination of the nursing home contract, as

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21. 379 U.S. 203 (1964).

22. *Id.* at 205. To meet the "timely notice" requirement, the union was required to give 60 days notice to the employer of its desire to modify or terminate the agreement. *Id.*

23. *Id.* at 206.

24. *Id.* at 215.

25. *Id.* at 218 (Stewart, J., concurring).

26. *Id.* at 223 (Stewart, J., concurring). Stewart commented that:

> Many decisions made by management affect the job security of employees. Decisions concerning the volume and kind of advertising expenditures, product design, the manner of financing, and sales, all may bear upon the security of the workers' jobs. Yet it is hardly conceivable that such decisions so involve "conditions of employment" that they must be negotiated with the employees' bargaining representative.

Id.

27. *Id.* at 225-26 (Stewart, J., concurring).

28. 452 U.S. 666 (1981).

29. *Id.* at 668-70.

the employer implemented the termination of the contract without bargaining.[30] The Court held that the employer's unilateral action did not violate the NLRA because the "harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision."[31]

The majority in *First National Maintenance* applied a two step test in arriving at the conclusion that the employer's unilateral action was not violative of the NLRA. First, collective bargaining is only required if the proposed subject of discussion is amenable to resolution through the collective bargaining process[32] and, second, if the benefit to the collective bargaining process of bargaining outweighs the burden placed on conducting the business.[33] The first step ensures that the employer can escape collective bargaining to the extent necessary for the operation of a profitable business.[34] The second step further ensures that even when a subject is amenable to resolution through the bargaining process, the employer is insulated from forced bargaining if the burden placed on the employer outweighs the harm to the collective bargaining process. This decision essentially discards the per se test and provides the employer with the means to justify unilateral action.

The Board, however, seemingly has not been able to apply the very clear test in *First National Maintenance.* This difficulty is apparent in the Board's *Otis Elevator Co. II*[35] decision. In *Otis II*, the employer decided to terminate research and development operations in two separate plants and to consolidate these two operations at a third existing plant.[36] The employer took the action to redesign the product in an effort to make it competitive in the market.[37] Relying on language in *First National Maintenance* and Justice Stewart's concurring opinion in *Fibreboard*,[38] which recognized the importance of freeing management from the constraints of collective bargaining to the extent necessary to run a profitable business, the Board held that the employer's decision to transfer the research and development operations was not a mandatory subject of bargaining.[39]

The plurality opinion focused upon the nature of the employer's decision. Where the decision turns upon a change in the direction of the business, then it is not amenable to resolution and can be implemented without prior bargaining and without violating the NLRA.[40] If, however, the decision turns merely on

30. *Id.* at 666-70.
31. *Id.* at 686.
32. *Id.* at 678.
33. *Id.* at 679.
34. *Id.* at 678-79.
35. 269 N.L.R.B. 891 (1984). This decision is referred to as *Otis II* because the Board had heard this case on a prior occasion and found a NLRA violation. In *Otis II* the Board reversed its prior decision and held that the employer had not violated the NLRA.
36. *Otis II*, 269 N.L.R.B. at 892.
37. *Id. See First Nat'l Maintenance Corp.*, 452 U.S. at 678-79.
38. *Otis II*, 269 N.L.R.B. at 892.
39. *Id.*
40. *Id.*

labor costs, it is amenable to resolution and any unilateral action would violate the NLRA.[41] Characterizing the decision as one affecting the direction of the business, the Board found no violation of the NLRA.[42] Member Zimmerman concurred in the finding that no NLRA violation had occurred. However, Zimmerman dissented in part because he felt that the effects of the decision to transfer the operations should have been a mandatory subject of bargaining.[43]

A concurring opinion in *Otis II* by Member Dennis clearly adopted the two step analysis of *First National Maintenance*.[44] While the plurality and Zimmerman opinions concentrated on the first step of the *First National Maintenance* test, Dennis developed both steps of the test. According to Dennis, the key factor in the first step is whether "a factor over which the union has control . . . [is] a significant consideration in the employer's decision."[45] If the decision is based on a factor over which the union has little or no control, the decision is not amenable to resolution through the collective bargaining process and the analysis ends.[46] If the decision is based on a factor over which the union has significant control, the analysis takes a second step and bargaining is required only if the benefit to the collective bargaining process outweighs the resultant burden on the employer.[47] Dennis then set forth the relevant burden elements outlined in *First National Maintenance*:

(a) extent of capital commitment . . .;
(b) extent of changes in operation . . .;
(c) need for speed . . .;
(d) need for flexibility . . .; [and]
(e) need for confidentiality.[48]

Dennis further highlighted courts of appeals decisions which had used these types of criteria prior to and after *First National Maintenance* to allow unilateral action by employers in efforts to avoid loss of a principal customer,[49] to update plant technology,[50] and to change an existing distribution system by replacing salesmen with independent contractors.[51] Dennis finally concluded that the employer's decision in *Otis II* was not amenable to resolution through the bargaining process, but he was quick to point out that even if a decision passed the first step of the test, the decision would still have to pass the balancing test of step two before it would be considered a mandatory subject of bargaining.[52]

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41. *Id.*
42. *Id.* at 893.
43. *Id.* at 900 (Zimmerman, concurring and dissenting).
44. *Id.* at 895 (Dennis, concurring). *See supra* notes 32-34 and accompanying text.
45. 369 N.L.R.B. at 897 (Dennis, concurring).
46. *Id.* (Dennis, concurring).
47. *Id.* (Dennis, concurring).
48. *Id.* (Dennis, concurring).
49. *Id.* at 898 (Dennis, concurring) (citing NLRB v. Transmarine Navigation Corp., 380 F.2d 933 (9th Cir. 1972)).
50. *Id.* at 897 & n.9 (Dennis, concurring) (citing NLRB v. Island Typographers, 705 F.2d 44 (2d Cir. 1983)).
51. *Id.* at 898 (Dennis, concurring) (citing NLRB v. Adams Dairy, 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966)).
52. *Otis II*, 269 N.L.R.B. 891, 899-900 (1984). Commenting on the application of step two of the *First National Maintenance* test, Member Dennis stated that even if labor costs had been a significant factor in the

After comparing the *Otis II* opinions to the Supreme Court's opinion in *First National Maintenance*, it is clear that Member Dennis's concurring opinion is the most accurate and instructive interpretation of the Court's two step test. Although the plurality in *Otis II* properly ended the analysis of the issue after finding that the employer's decision was not amenable to resolution through the bargaining process, the absence of any comprehensive discussion of the second step has led to confusion over the validity of the balancing test in step two.

Before analyzing the Board's recent application of *Otis II* and *First National Maintenance*, it is interesting to note the view of one court of appeals on the confusion surrounding which test is proper when analyzing a unilateral action case. In *United Food and Commercial Workers v. NLRB*,[53] the Court of Appeals for the District of Columbia Circuit recognized that all three opinions set forth in *Otis II* are still valid and that the Board has refused to choose one standard as the definitive test.[54] Instead, the Board has found that subsequent cases either satisfy all or none of the tests developed in *Otis II*.[55] The opinion in *United Food and Commercial Workers* encourages the Board "to attempt to articulate a majority-supported statement of the rule that the Board will be applying now and in the future in determining whether a particular decision is subject to mandatory bargaining or not."[56] Confusion concerning the applicable rule becomes evident after examining the Board's treatment of decisions relating to economic layoffs.

III. *LAPEER FOUNDRY*: A RIGID APPROACH TO ECONOMICALLY MOTIVATED LAYOFFS

A. *Pre*-Lapeer Foundry *Board Decisions*

The *Lapeer Foundry*[57] case is the focal point of the Board's recent efforts to exclude any possibility of unilateral decision making by the employer when an economic layoff is contemplated. To demonstrate the Board's progression toward this stance, it is necessary to examine Board decisions prior to the *Lapeer Foundry* decision. In *Litton Business Systems*,[58] the employer had lawfully decided to discontinue one type of printing process and institute a different and

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employer's decision, this would not have required a decision that the employer's decision was a mandatory subject of bargaining. *Id.* at 900.

53. 880 F.2d 1422 (1989).

54. *Id.* at 1432.

55. *Id. See, e.g.*, FMC Corp., 290 N.L.R.B. No. 62, 131 L.R.R.M. (BNA) 1130, 1134 (July 29, 1988) (employer's decision did not violate the NLRA under any of the *Otis II* tests); Connecticut Color Inc., 288 N.L.R.B. No. 81, 128 L.R.R.M. (BNA) 1211, 1212 n.3 (Apr. 28, 1988) (employer's decision violated the NLRA under any of the *Otis II* tests); Storer Cable TV, 295 N.L.R.B. No. 34, 131 L.R.R.M. (BNA) 1769, 1772 (June 15, 1989) (employer's decision violated the NLRA under any of the *Otis II* tests).

56. *United Food and Commercial Workers*, 880 F.2d at 1436-37.

57. 289 N.L.R.B. No. 126, 129 L.R.R.M. (BNA) 1001 (July 20, 1988).

58. 286 N.L.R.B. No. 817 (1987), *rev'd in part*, NLRB v. Litton Financial Printing Div., 893 F.2d 1128 (9th Cir. 1990).

more efficient printing process.[59] However, the Board found a section 8(a)(5) violation because the employer failed to bargain over the decision to lay off ten employees who worked primarily on the discarded printing process.[60] Although the administrative law judge had found the conversion decision and the layoff decision "inextricably intertwined"[61] and therefore not mandatory subjects of bargaining, the majority in *Litton* determined that the layoff was an effect of the conversion decision and therefore was a mandatory subject of bargaining.[62] A strong and well reasoned dissent by Chairman Dotson questioned the separation of the conversion decision and the layoff decision.[63] Dotson reasoned that the "layoff decision was totally dependent on and a natural result of [the] conversion decision."[64] Once the conversion decision was deemed proper without prior bargaining, the employer should have been permitted to lay off employees connected with the discarded printing process as the natural implementation of the conversion decision.[65] Relying on *First National Maintenance* and its expression of the employer's need for unencumbered decision making to run a profitable business, Dotson considered the conversion decision and the layoff decision as one decision, which was not a mandatory subject of bargaining.[66]

In *NLRB v. Advertisers Manufacturing Co.*,[67] the Court of Appeals for the Seventh Circuit was faced with a unilateral layoff decision that occurred after certification of a bargaining representative but before the employer signed a collective bargaining agreement.[68] The employer's argument that the layoffs were motivated by a downward trend in its sales and not by union animus was rejected by the Board and the appellate court, which found the employer to be in violation of the NLRA.[69] Calling the economic circumstances of the employer irrelevant,[70] the Seventh Circuit clearly indicated a return to the per se test of invalidity in relation to unilateral action by an employer. No mention was made of the *First National Maintenance* two step test. The Board and the Seventh Circuit summarily assumed that the decision was amenable to resolution through the bargaining process and then failed to weigh the employer's need to operate freely in order to run a profitable business.

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59. *Litton*, 286 N.L.R.B. at 817. The decision to change printing processes was motivated by four factors: dissatisfaction with the former process' product which caused a loss of orders; the greater economy of the new process; the ability of the new process to handle surplus orders in the event of an emergency; and the expectation that the new process would reduce training and equipment costs. *Id.*

60. *Id.* at 819.

61. *Id.*

62. *Id.*

63. *Id.* at 824 (Dotson, dissenting).

64. *Id.* (Dotson, dissenting).

65. *Id.* (Dotson, dissenting).

66. *Id.* at 825 (Dotson, dissenting). Dotson points out that certain management decisions may result in the loss of jobs even though they are outside the scope of mandatory bargaining. *Id.*

67. 823 F.2d 1086 (1987).

68. *Id.* at 1090.

69. *Id.*

70. *Id.*

B. Lapeer Foundry

The possibility of unilateral action by the employer in making economic layoffs theoretically remained viable after *Litton* because *Litton* involved an economic layoff linked with a unilateral decision to convert the employer's printing process. Moreover, the *Advertisers Manufacturing Co.* decision was arguably of little precedential value because it failed to apply the two step test of *First National Maintenance*. This theoretical possibility of unilateral action in the economic layoff area, however, was put to rest by the *Lapeer Foundry* decision. In *Lapeer Foundry*,[71] seven employees were unilaterally laid off for economic reasons without notice to the union.[72] The Board found the employer's action to be in violation of the NLRA and stated that economic layoffs were a mandatory subject of bargaining.[73] In arriving at this conclusion, the Board applied both the nature of the decision test in the *Otis II* plurality opinion and the *First National Maintenance* two step test.[74] Under the nature of the decision test, a decision to lay off employees turns on labor costs and must therefore be a subject of bargaining.[75] The two step test was satisfied because the union could offer alternatives to the layoff and the burden of bargaining on the employer was outweighed by the benefit accruing to the bargaining process. The Board stated that "legal requirements that exist to ensure meaningful bargaining in a timely fashion" are enough to adequately address any concerns of the employer.[76] The *Lapeer Foundry* decision does pay lip service to the idea that compelling economic circumstances may exist which would excuse an employer's failure to bargain over a layoff decision,[77] but the quick dismissal of Member Dennis's two step test (equivalent to the *First National Maintenance* test) makes the compelling economic circumstance defense meaningless or nonexistent.[78] The Board's satisfaction of the two step test is based on the legal requirements that exist which ensure bargaining in a meaningful and timely fashion.[79] It is difficult to hypothesize a situation where this ambiguous phrase could ever be used to adequately weigh the burden of bargaining placed upon the employer when economic circumstances require the employer to take unilateral action.

C. *Post*-Lapeer Foundry *NLRB Decisions*

Board decisions subsequent to *Lapeer Foundry* have strengthened the position that no economic circumstances will justify a refusal to bargain before implementing economically motivated layoffs. In *Adair Standish Corp.*,[80] the em-

71. 289 N.L.R.B. No. 126, 129 L.R.R.M. (BNA) 1001 (July 20, 1988).

72. *Id.* at 1003.

73. *Id.* at 1004.

74. *Id.* at 1003-04. The "nature of the decision" test as stated in *Otis II* is "whether [the decision] turns upon a change in the nature or direction of the business, or turns upon labor costs; *not* its effect on employees nor a union's ability to offer alternatives." Otis Elevator II, 269 N.L.R.B. 891, 892 (1984) (emphasis in original).

75. *Lapeer Foundry*, 129 L.R.R.M. (BNA) at 1004.

76. *Id.*

77. *Id.* at 1005.

78. *Id.* at 1003-04.

79. *Id.* at 1004.

80. 292 N.L.R.B. No. 101, 130 L.R.R.M. (BNA) 1345 (Feb. 8, 1989).

ployer implemented economic layoffs without notification to the newly certified union.[81] The employer argued that it had no duty to bargain with the union over this decision because the employer had always implemented economic layoffs without notice to the employees.[82] The Board rejected this argument and held that the employer violated the NLRA by unilaterally implementing the layoffs because the intervention of the bargaining representative made this type of action a mandatory subject of bargaining.[83] Any possibility of a past practice defense by employers was, therefore, soundly defeated by *Adair Standish Corp.*

The second major Board decision on economically motivated layoffs following *Lapeer Foundry* was *Stamping Specialty Co.*[84] As in *Adair Standish Corp.*, an employer faced with a decline in orders decided to implement a layoff.[85] Relying on the *Otis II* nature of the business test,[86] the Board held that the employer had violated the NLRA.[87] *Stamping Specialty Co.* does not mention the *First National Maintenance* two step test. Furthermore, the uselessness of the compelling economic circumstance defense is revealed as it is summarily dismissed by the Board.[88] In commenting on the defense, the Board offers only the example of *Aquaslide 'N' Dive Corp.*[89] as representative of the compelling economic circumstance defense.[90] In *Aquaslide*, no NLRA violation was found when an employer failed to bargain over a layoff decision brought on by a bankruptcy proceeding.[91] Restricting the defense to a bankruptcy situation evidences the Board's intent to recognize this defense sparingly, if at all, in relation to economic layoffs. Moreover, *Aquaslide* was decided prior to *Lapeer Foundry* and no subsequent Board decisions have recognized this defense.[92]

In *United Gilsonite*,[93] the Board again continued its rigid treatment of the compelling economic circumstance defense. The decision to implement layoffs was made because of a serious deterioration in business.[94] The administrative law judge "found that the layoff was directly and solely related to the economic condition of the [employer]."[95] The Board nevertheless summarily dismissed the employer's compelling economic circumstance argument.[96] This decision once again contains no discussion of the employer's specific economic situation. For some reason, the Board feels compelled to pay lip service to the economic cir-

81. Adair Standish Corp., 130 L.R.R.M (BNA) at 1345.
82. *Id.*
83. *Id.*
84. 294 N.L.R.B. No. 56, 131 L.R.R.M. (BNA) 1740 (May 31, 1989).
85. Stamping Specialty Co., 131 L.R.R.M. (BNA) at 1741.
86. *Id. See supra* note 74.
87. Stamping Speciality Co., 131 L.R.R.M. (BNA) at 1742.
88. *Id.* at 1741.
89. 281 N.L.R.B. 219 (1986).
90. Stamping Specialty Co., 131 L.R.R.M. (BNA) at 1741.
91. 281 N.L.R.B. at 219 n.2.
92. *Cf.* FMC Corp., 290 N.L.R.B. No. 62, 131 L.R.R.M. (BNA) 1130, 1133-34 (July 29, 1988) (employer's unilateral act in shifting work from unionized plant to nonunionized plant did not violate the NLRA because the *Otis II* tests were met and the employer's decision making ability regarding work relocation was not contractually restricted).
93. 291 N.L.R.B. No. 125, 131 L.R.R.M. (BNA) 1034 (Nov. 30, 1988).
94. United Gilsonite, 131 L.R.R.M. (BNA) at 1034.
95. *Id.*
96. *Id.*

cumstance defense before dismissing it without a meaningful discussion in light of the facts of each case.[97] Furthermore, the opinion completely ignores any reference to *Otis II* and *First National Maintenance*, the decisions which provide the basic principles on which the opinion should be based.

The post-*Lapeer Foundry* Board decisions have sent a clear message to employers that all economically motivated decisions to lay off employees must be bargained over regardless of the employer's current economic situation. The Board has demonstrated this by only paying lip service to the compelling economic circumstance defense. In the three Board decisions following *Lapeer Foundry*, the discussion of this defense has commanded only one sentence in the respective opinions. In the future, it would not be surprising if the Board eliminated any reference to this defense. That approach would more accurately display the Board's position toward the compelling economic circumstance defense.

IV. A SUGGESTED RETURN TO *FIRST NATIONAL MAINTENANCE*

A. *The* Lapeer Foundry *line: Losing Sight of* First National Maintenance

The Board, in arriving at its current stance toward the compelling economic circumstance defense, has ignored the Supreme Court's *First National Maintenance* decision. In *First National Maintenance*,[98] a two step test was adopted in reference to an employer's decision to close a part of its business without prior bargaining. These steps are designed to protect the same goal as the compelling economic circumstance defense. That goal was set forth in *First National Maintenance* when Justice Blackmun stated that "[m]anagement must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business."[99] If the employer is so constrained by bargaining that it becomes impossible to operate profitably, all of the employees end up in the unemployment line. The *Lapeer Foundry*-line cases all involve employers who implemented layoffs based solely on economic problems. No union animus motivating the layoff decisions was found. When economic conditions cause a need for layoffs, what can the union do to solve the economic problems of the employer? By clinging so strongly to the position that every economic layoff decision should be a mandatory subject of bargaining, the Board loses sight of the fact that for the collective bargaining process to be effective, the employer must be able to operate profitably so that the employer is not forced into bankruptcy.

The Board's inability to accurately apply the Court's decision in *First National Maintenance* did not originate in *Lapeer Foundry*. The confusion was first encountered in *Otis II* where the Board arrived at three different formula-

97. Only once has the Board adequately considered the particular facts of a layoff decision and, not surprisingly, no NLRA violation was found. Storer Cable TV, 295 N.L.R.B. No. 34, 131 L.R.R.M. (BNA) 1769 (June 15, 1989).

98. First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981).

99. *Id.* at 678-79.

tions of the test.[100] As previously discussed, the concurring opinion written by Member Dennis is the best restatement of the two step test; the plurality opinion and Member Zimmerman's opinion failed to give any weight to step two of the test.[101] The plurality opinion's failure to consider step two has had precedential effect as the *Lapeer Foundry*-line cases have ignored the balancing test.

The Board should have adopted the test set forth in Member Dennis's concurring opinion. Only through the application of the two step test is the employer's ability to operate profitably adequately protected. When applying the test, it is questionable whether the economically motivated decision to layoff employees is amenable to resolution through the bargaining process. What action can the bargaining representative take which will cure the economic woes of the employer?[102] Moreover, the second step of the test would certainly require more of a balancing than the Board is currently applying. While an employer should not be able to justify every economic layoff decision without prior bargaining, the Board should commit more than one sentence of its opinions to the balancing of the burden that bargaining will place on the employer. Bargaining over a decision to lay off two or three employees may evolve into bargaining over a decision to lay off twenty or thirty if quick action is needed on the part of the employer to curb an economic decline. The adoption of the two step test and a more thorough balancing would give life to the Supreme Court's mandate that all employers should be free from constraints to the extent necessary for the operation of a profitable business and would provide employers with a guideline to determine which economic circumstances fall within the exception.

B. *Considering the Burden on the Employer*

Unilateral action by the employer has been permitted by the courts under certain circumstances. These past decisions provide the Board with a precedential backdrop that can be used to determine whether the benefit of bargaining outweighs the resultant burden placed on the employer's effort to operate a profitable business. The first category of accepted unilateral action concerns decisions at the core of managerial control. *First National Maintenance* is an example of this category. The employer was permitted to terminate a contract with a customer without prior bargaining even though the effect of the termination of the contract was the termination of certain employees who were members of a recently certified bargaining unit.[103] The negotiation or unilateral termination of the contract with the customer was considered within the core of managerial control.

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100. *See supra* notes 35-52 and accompanying text (noting the three separate formulations of the *First National Maintenance* test).

101. *See supra* notes 44-52 and accompanying text.

102. Although a union may offer wage concessions or givebacks, these decisions must go through the slow bargaining process, preventing the employer from reacting quickly to an economic downturn.

103. First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981).

The Board also accepted the managerial control exception in *Kingwood Mining Co.*[104] In *Kingwood*, the employer shut down its coal-mining operation and subcontracted the work, but continued to operate a portion of the business that processed coal.[105] The Board held that the employer was not required to bargain because the decision to terminate the mining operation was a basic management decision independent of the other operation.[106]

Member Dennis' concurring opinion in *Otis II* mentions several circuit courts of appeals decisions that recognized the core of managerial control category.[107] Although the Board has often failed to give effect to appellate court decisions,[108] these decisions provide satisfactory examples of how and when the Board should apply the step two balancing test. The Court of Appeals for the First Circuit, for example, held that an airline had no duty to bargain over a decision to merge with another airline in *International Association of Machinists v. Northeast Airlines*.[109] The court stated that "merger negotiations require a secrecy, flexibility and quickness antithetical to collective bargaining."[110] Furthermore, in *NLRB v. Adams Dairy*,[111] the Court of Appeals for the Eighth Circuit held that an employer did not violate the NLRA when it made a basic operational change.[112] In *Adams Dairy*, the employer decided to replace its existing distribution system of driver-salesmen with independent contractors.[113] The court did not require bargaining over this decision because it would have significantly abridged the employer's ability to manage its own affairs.[114] Although the decision to lay off employees is probably not a change in the basic structure of an employer's business, the above cases are valuable because they demonstrate that the burden placed on the employer by bargaining has been considered effectively in the past and should be considered by the Board in the future.

A second category of accepted unilateral action by the employer more closely related to the subject of economic layoffs is the compelling economic circumstance category. This category contains cases in which unilateral action by the employer, often involving a managerial-core type decision, has been excused because of economic circumstances that require the employer to take quick and decisive action. This category differs from the first category in that these decisions are the result of pressing economic circumstances and have not

104. 210 N.L.R.B. 844 (1974).

105. *Id.* at 844-45.

106. *Id.* at 845.

107. 269 N.L.R.B. 891, 897-98 (1984) (Dennis, concurring).

108. Modjeska, *The NLRB Litigational Processes: A Response to Chairman Dotson*, 23 WAKE FOREST L. REV. 399 (1988). Modjeska writes that the Board "determines on an *ad hoc* discretionary basis whether or not to acquiesce in the views of the national labor law . . . articulated by the various federal circuit courts of appeal." *Id.* at 399. This position leaves open the possibility of using the cited courts of appeals decisions as a guide when applying the *First National Maintenance* test.

109. 473 F.2d 549 (1st Cir. 1972).

110. *Id.* at 557. *See also* First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 683 n.20 (1980).

111. 350 F.2d 108 (8th Cir. 1965).

112. *Id.* at 111.

113. *Id.*

114. *Id.*

been in the planning stages for many months. In *New York Mirror*,[115] the employer decided to sell its business and, therefore, unilaterally terminate operations.[116] Noting that the decision to shut down was brought on solely by pressing economic necessity, the Board found no duty to bargain over the shutdown decision.[117] A key factor in this decision was the Supreme Court's statement in *NLRB v. Katz*,[118] which left open the possibility that certain circumstances might excuse unilateral action by the employer.[119] Moreover, in *General Motors Corp.*,[120] as modified by *Royal Typewriter Co.*,[121] the Board held that an employer does not have to bargain about an economically motivated decision to sell an independent dealership.[122] Finally, in *Royal Plating & Polishing*,[123] an employer that had been suffering losses for seven years decided to close one of its plants instead of relocating the plant.[124] The Court of Appeals for the Third Circuit found no NLRA violation because economic circumstances required the company to recommit and reinvest funds into the business.[125]

While the preceding cases are extreme examples of economic hardship, the concurring opinion by Member Dennis in *Otis II* provides a few examples of compelling economic circumstances of a positive nature in which no prior bargaining was required.[126] In *NLRB v. Transmarine Navigation Corp.*,[127] the Court of Appeals for the Ninth Circuit considered the burden on the employer of bargaining over the employer's decision to expand its port facilities in order to keep its principal customer.[128] The court did not require bargaining, finding the loss of the customer highly probable unless the employer took quick and decisive action.[129] Similarly, in *NLRB v. Rapid Bindery*,[130] the employer was not required to bargain over a decision to transfer plant operations to a larger facility in order to avoid losing a principal customer.[131]

Although the courts in both *Transmarine Navigation Corp.* and *Rapid Bindery* permitted the employer's unilateral action based upon the core of managerial control theory, Member Dennis correctly cites these cases as examples where the employer burden elements of speed and flexibility, among others, outweigh the benefit of bargaining to the bargaining process.[132] When faced with

115. 151 N.L.R.B. 834 (1965).
116. *Id.* at 835-37.
117. *Id.* at 841.
118. 369 U.S. 736, 748 (1961).
119. New York Mirror, 151 N.L.R.B. at 841.
120. 191 N.L.R.B. 951 (1971).
121. 209 N.L.R.B. 1006 (1974).
122. *Id.* at 1012.
123. 350 F.2d 191 (3d Cir. 1965).
124. *Id.* at 193.
125. *Id.* at 196.
126. 269 N.L.R.B. 891, 898 (1984) (Dennis, concurring).
127. 380 F.2d 933 (9th Cir. 1967).
128. *Id.* at 934, 936.
129. *Id.* at 936.
130. 293 F.2d 170 (2d Cir. 1961).
131. *Id.* at 175-76.
132. *Otis II*, 269 N.L.R.B. at 898 & n.13 (Dennis, concurring). The fact that both decisions predate *First National Maintenance* and *Otis II* explains the absence of any discussion of employer burden elements that must be examined in step two of the *First National Maintenance* test.

the loss of a principal customer due to positive economic developments, both employers were able to respond quickly and decisively because they were not slowed by a lengthy bargaining period.

The compelling economic circumstance category, as well as the managerial core category, will provide the Board with a proper framework for balancing the burden placed on the employer as required by step two of the *First National Maintenance* test. Moreover, Member Dennis' concurring opinion in *Otis II* sets forth several burden elements that should be considered when applying the balance including speed, flexibility, extent of capital commitment, confidentiality, and extent of changes in operations.[133] Member Dennis' use of the *Transmarine Navigation Corp.* and *Rapid Bindery* decisions to demonstrate the speed and flexibility burden elements is particularly noteworthy because the decisions permit unilateral action by the employer arising from unusually positive economic circumstances. On the other hand, in *Royal Plating & Polishing*, the court excused the unilateral action of closing down a plant because of severe economic losses. The subject of economic layoffs would seem to fall somewhere between these two opposite examples. Speed and flexibility are extremely important in the decision to implement economic layoffs. A decision to lay off a small number of employees in an effort to cut economic losses must not be delayed because *any* delay may cause the loss to increase, thus requiring the layoff of a larger number of employees. As in *Transmarine Navigation Corp.* and *Rapid Bindery*, the employer must be free to implement certain economically necessitated layoffs without any bargaining delay.

Although this Comment does not suggest that every economically motivated decision to implement layoffs would meet the step two balancing test, it does suggest that the Board should apply the balancing test in a more thorough manner instead of merely paying lip service to the compelling economic circumstance defense. Using the various court and Board decisions permitting unilateral action under certain circumstances, and the factors offered by Member Dennis, the Board is capable of, and should apply, a thorough balancing which considers the burden that bargaining places on the employer planning economically motivated layoffs.

C. *Further Justification For Balancing: Economic Health*

A final policy consideration exists that provides strong support for the *First National Maintenance* two step test. Unilateral action by the employer is usually, if not always, considered illegal by the Board[134] because it tends to "undermine the prestige of the union in the eyes of the employees."[135] This, in turn, may cause the employees to withdraw their support from the union, or the employees may become so outraged that they take action to interrupt the ordinary course of business.[136] Using this rationale, the Board strikes down any unilateral

133. *Id.* at 897 (Dennis, concurring).

134. *See supra* notes 12, 14-27 and accompanying text.

135. Bowman, *An Employer's Unilateral Action—An Unfair Labor Practice?*, 9 VAND. L. REV. 487 (1956). *See, e.g.*, NLRB v. Carbonex Coal Co., 679 F.2d 200, 204-05 (10th Cir. 1982).

136. *Id.* at 497.

action merely because it is unilateral. Various commentators, however, have recognized that forcing the collective bargaining process on management in every decision-making situation has a negative effect on economic efficiency.

Guy Farmer, for example, recognized that identifying subjects for the collective bargaining process should be an attempt to appropriately accommodate employee rights and management responsibility.[137] Farmer also presented a list of areas that should be primarily the responsibility of the employer, including "decisions as to price, products, processes, work methods and techniques and the whole area of efficiency and economy of operation."[138] Farmer further recognized the burden placed on the employer by the collective bargaining process itself. The submission of an issue to the bargaining process requires the employer to defer necessary business action. Moreover, bargaining will sometimes completely negate the employer's power to make the decision because the issue may be moot before it is bargained to conclusion.[139] Viewing this problem on the macroeconomic level, Farmer states that preserving freedom in employer decisionmaking is a matter of public concern because management flexibility is essential to "the preservation of a competitive position in the world."[140] Although he was writing more than twenty-five years ago, Farmer correctly predicted this country's current foreign trade problems. In an effort to encourage a healthy economy which will generate more jobs, Farmer concludes:

> Employers must of necessity, therefore, become more cost-conscious and must have the means and the freedom to expand and contract their operations, to eliminate one operation or add another, to install new processes and discard old ones, to eliminate jobs or change their content, and indeed, to give up the ghost entirely if competitive factors dictate.[141]

A second commentator, Mark Goldman, also recognized the basic conflict between achieving long-run economic growth and implementing the policies of the NLRA.[142] The Board must realize that the union cannot objectively evaluate certain decisions because the union will always seek a result that will benefit the union at the expense of the economy in general.[143] The Board must consider this effect on the general economy when making decisions that involve economically motivated layoffs or other unilateral action. Goldman also is of the opinion that the free flow of capital is so essential to long-term growth that the employer should be put in a superior economic position during the bargaining process if necessary to maintain the free flow of capital.[144] This freedom is then generally beneficial to labor because employees are also consumers who benefit from an economy that responds to their desires, and because a greater national

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137. Farmer, *Good Faith Bargaining Over Subcontracting*, 51 GEO. L.J. 558, 565 (1963).

138. *Id.*

139. *Id.* at 567.

140. *Id.* at 568-69.

141. *Id.* at 577.

142. Comment, *"Partial Terminations"—A Choice Between Bargaining Equality and Economic Efficiency*, 14 U.C.L.A. L. REV. 1089 (1967).

143. *Id.* at 1091.

144. *Id.* at 1093.

income will generate increased consumption and investment which increases the demand for labor services.[145]

Although Goldman's comments were directed toward partial terminations, many of his thoughts have relevance to the subject of economic layoffs. When economic conditions result in one part of a business becoming unprofitable, "the supply and demand forces of the economy have signaled to the employer that his particular conduct is in overabundance relative to demand."[146] The *Lapeer Foundry*-line cases are clear examples of the economy sending a message to employers that they are not operating efficiently and must, therefore, take quick action to avoid severe economic losses. If the employer is unable to accomplish this goal, it runs the risk that the entire operation will shut down as a result of financial problems, in which case all the employees will be laid off.

A third commentator, Raymond Goetz, also recognized the economic impact of bargaining over a management decision to subcontract work or to entirely shut down an operation.[147] Similar to the commentators mentioned above, Goetz laments the lack of significance that the Board has traditionally attached to "the degree of economic necessity for . . . unilateral action."[148] Goetz further considers union tactics that have an adverse effect on employers' behavior. Union tactics such as blocking, delaying, or modifying the employer's action by threatening or using economic pressure, affect estimated cost savings of particular employer actions.[149] These extra costs are increased if the employer takes unilateral action and is then penalized by an expensive Board remedy.[150] Therefore, if every unilateral action is submitted to the bargaining process, the union can "elevate its status to that of a co-manager whose views . . . must be solicited and considered in connection with every decision which might affect the employment relationship."[151]

In addition to the negative effect of union delay tactics, Goetz also correctly interpreted the Supreme Court's decision in *NLRB v. Katz*,[152] which intimated that certain unilateral acts may not be violative of the NLRA.[153] Although economic layoffs affect employment, they are the inevitable result of economic downturns over which the union has no influence. Conversely, if labor as a national body decides to heap economic pressure on management in the aggregate, labor can have a negative impact on the economy by requiring the employer to bargain about every management decision to the extent that the

145. *Id.* at 1093-94.

146. *Id.* at 1105.

147. Goetz, *The Duty To Bargain About Changes in Operations*, 1964 DUKE L.J. 1.

148. *Id.* at 7.

149. *Id.* at 9.

150. *Id.* at 9-10.

151. *Id.* at 10, 14. Goetz makes a further theoretical distinction between bargaining about the actual decision and bargaining merely about the effects of the decision. The actual act of making the decision does not affect the employment because unforeseen circumstances may arise which make the implementation of the decision unnecessary. Only the actual implementation of the decision affects the employment of the union members. Therefore, it is proper to bargain in reference to the effects of the decision and this Comment does not deny the legitimacy of bargaining over the effects of an economically motivated unilateral layoff.

152. 369 U.S. 736 (1962); *see supra* notes 14-20 and accompanying text.

153. *Katz*, 369 U.S. at 747-48.

employer is unable to operate profitably and hence must lay off more workers. Laid off workers do not have the resources to consume goods and, thus, the situation ultimately results in a depressed economy in which both the employer and the employees suffer. These considerations led Goetz to the conclusion that the Board is incorrect in its assumption that any unilateral action that relates to conditions of employment is an illegal refusal to bargain under the NLRA.[154]

The common theme running throughout the articles written by Farmer, Goldman, and Goetz is that the Board's assumption that any unilateral action by an employer is violative of the NLRA, fails to take into account the harmful effect that this position has on each individual employer as well as the national economy. The management decision to lay off employees because of economic losses is triggered by the forces of supply and demand, forces that the union cannot control. The employer makes the decision not in order to harm the union but in order to operate the company profitably so that the laid off employees may, in the future, be called back to work. By requiring that every economically motivated decision to lay off employees is subject to prior bargaining, the effect of a slight economic downturn is multiplied as the layoff decision proceeds through the sluggish negotiation process, thus delaying the implementation of the layoff and increasing the losses suffered by the employer, which in turn may result in more layoffs.

Alternatively, the Board should choose the path mapped out by the *First National Maintenance* decision. Assuming, for the sake of argument, that all economic layoffs are amenable to resolution through the bargaining process, the second step or balancing test would provide the Board with a tool to deal with the inherent conflict between implementing the policies of the NLRA and achieving long-term economic growth. When applying the balancing test, the Board will be able to weigh the burdens placed on the employer and on the overall economy by forced bargaining on the subject of economic layoffs. This consideration of the national economy is important to the country's competitive position in the world market, especially in light of the newly developing foreign markets of Eastern Europe, as well as the integration of the European Common Market in 1992. This Comment does not suggest that no economically motivated layoff decisions should be mandatory subjects of bargaining; rather, it suggests only that the Board should abandon its rigid approach to this area by adopting the *First National Maintenance* test as analyzed by Member Dennis' concurring opinion in *Otis II*. If that occurs, the Board will not deem as mandatory subjects of bargaining those economically motivated layoff decisions in which the benefit of bargaining does not outweigh the resultant burdens on the employer.

V. CONCLUSION

Approximately thirty years ago, in *NLRB v. Katz*, the Supreme Court rejected the position that all unilateral action by the employer is a violation of the NLRA merely because of its unilateral character. The Court's concern that

154. Goetz, *supra* note 147, at 29.

certain management decisions should not be mandatory subjects of bargaining was later reflected in the two step test developed in *First National Maintenance*. The two step test is formulated to protect the employer from burdening constraints that would make it impossible for the employer to operate a profitable business.

The Board, however, recently has had great difficulty (or perhaps an intentional reluctance) in applying the two step test. For example, the Board's first attempt at applying the *First National Maintenance* test resulted in three different opinions in *Otis II*. The recent *Lapeer Foundry*-line cases evidence the Board's continued difficulty as well as its intent to completely ignore the balancing test contained in step two. In the *Lapeer Foundry*-line, the Board has failed to consider the burden placed on the employer by requiring bargaining over all economically motivated layoff decisions prior to their implementation, regardless of the employer's economic situation.

The Board should retreat from its strict stance toward unilateral action in relation to economic layoffs and should adopt the two step test formulated in *First National Maintenance,* as analyzed by Member Dennis in his *Otis II* concurring opinion. Using as guidelines past Board and court decisions which have recognized that the employer should be able to take certain unilateral action without prior bargaining, the Board should be able to apply the two step test successfully.

In applying the two step test to the subject of economically motivated layoffs, the Board must clear both hurdles presented by the test. Step one requires that the employer's decision be amenable to resolution through the bargaining process. This hurdle presents a problem in relation to economically motivated management decisions because there is little that the union can do to cure the economic woes of the employer. It is questionable whether the union can do anything to increase the demand of the employer's products so that the employer can continue to operate profitably with its current workforce. Even assuming that an economically motivated layoff decision is amenable to resolution through the bargaining process, step two requires that the benefit of bargaining to the bargaining process outweigh the burden placed on the employer. Only if both hurdles are cleared should the employer's decision be deemed a mandatory subject of bargaining. The balancing test in step two will allow the Board to achieve a more desirable balance between those economically motivated layoff decisions which should be subject to prior bargaining and those decisions which should not. Lastly, the balancing test should be used by the Board to consider not only the burden placed on the employer but also the burden that may be placed on the national economy by constraining employers so tightly that they are unable to compete in the world market. The time has come for the Board to give serious consideration to the employer's plight, as well as the employee's, in the area of economically motivated layoffs.

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